

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Cisco WebEx LLC Request for)	WCB Docket No. 06-122
Review of a Decision of the)	
Universal Service Administrator)	
)	

COMMENTS OF SPRINT NEXTEL CORPORATION

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I. Summary

Sprint Nextel Corporation (“Sprint”) supports Cisco WebEx LLC’s (“Cisco WebEx”) Request for Review of a Decision of the Universal Service Administrative Company (“USAC”). The Commission should reverse USAC’s unauthorized reclassification of information services as telecommunications and approve WebEx’s revenue reporting. The Commission should also take the opportunity to put an end to a policy adrift on a sea of *ad hoc*, inconsistent USF decisions and enact clear, transparent rules applicable to all, such as the connections-based system Sprint and others have proposed. If an interim solution is needed to address a shrinking USF base, the Commission should consider adopting now an industry proposal to add certain Multiprotocol Label Switching (“MPLS”) service revenues in the USF base.

The current approach to service classification and USF-contribution assessment is broken. The USAC audit report concerning the WebEx online collaboration service illustrates the adverse consequences of that breakdown. WebEx is a sophisticated online collaboration service, which Cisco WebEx reasonably believed to be an information service. USAC agreed that WebEx is an information service, but it labeled the voice feature of WebEx’s service as “bundled” rather than “integrated” with the information service. On this basis, USAC attempts to assess USF contributions upon some of the revenue from the WebEx service.

The Commission should address contribution reform directly through its current open proceeding. Attempting to expand the categories of services subject to USF contributions through individual adjudications is only creating greater uncertainty in the developing broadband market and is, in effect, implementing a fundamental policy change without a full and frank assessment of the impact of these decisions on the broadband economy. Expansion of USF assessment on information services is a fundamental step the Commission should take only after

a fully vetted rule making. Reclassification of information services as telecommunications should not be left to USAC, the fund administrator.

The USF is undoubtedly under pressure as the contribution base shrinks and expenses rise. Technology is evolving rapidly, and integrated information services are increasingly displacing old telecommunications-only services, shrinking the revenue base subject to USF assessment under existing rules. Recognizing the fundamental shift from telecommunications to information services, the FCC's 2011 *USF/ICC Transformation Order* approved allocating some USF support to broadband deployment.¹ As Sprint noted in its Comments on that proceeding, however, expansion of USF support for broadband services without addressing contribution reform will only exacerbate the tension between a shrinking contribution base and expanding USF-funding demands.

Recognizing this tension, the Commission issued an FNPRM asking whether the contribution base should include a number of previously excluded services, including all information services.² This rule making is still pending and has an extensive record from across the industry. Sprint, along with others, have made various proposals for ways in which the contribution base can be expanded in a competitively neutral manner that will result in a more stable USF. Indeed, Sprint in conjunction with other carriers, has proposed specific information

¹ *Connect Am. Fund; a Nat'l Broadband Plan for our Future; Establishing Just and Reasonable Rates for Local Exch. Carriers; High-Cost Universal Serv. Support; Developing an Unified Intercarrier Compensation Regime; Fed.-State Joint Bd. on Universal Serv.; Lifeline and Link-Up; Universal Serv. Reform—Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17,663 (2011) (“*USF/ICC Transformation Order*”).

² *Universal Serv. Contribution Methodology a Nat'l Broadband Plan for our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 5357, 5374-75 ¶ 28 (2012) (“*USF Contributions NPRM*”).

services that could be assessed if done in the appropriate manner. The Commission should address such fundamental issues as the definition of information services in this pending docket.

Unfortunately, these issues have largely been avoided to date. Recent Commission Orders on USF have contained ambiguous language and created tension with existing precedent. This ambiguity has left USAC to resolve issues with fundamental policy implications. Combined with pressure to find new revenue sources, this has resulted in a steady expansion of USF assessments to information services, one by one. The result is to unwind—without the requisite notice and comment, and contrary to law—the classification approach the Commission has applied for decades. And in the process, hundreds of unsuspecting information-service providers are surprised to find their services made subject to USF contributions by USAC audits rather than Commission rulemaking.

This *ad hoc* and unpredictable extension of USF assessments to information service harms the entire information-services marketplace. For example, Sprint must comply with a recent Commission order requiring Sprint to certify to its vendors that it pays into USF based on the revenues generated from each circuit.³ As a result, Sprint is currently planning to reconfigure its systems—at great expense and with no business purpose—to track how tens of thousands of circuits are utilized within its enterprise services. That order reversed the widely accepted practice of requiring purchasers to certify USF contributions only on an entity-wide basis. Not only is the requirement burdensome and costly to implement and maintain, but it is likely to cause vendors to make brand new direct USF contributions, which they will pass on to purchasers like Sprint. Even more damagingly, the order conveys an unfair competitive

³ See *Universal Serv. Contribution Methodology*, Order, 27 FCC Rcd. 13,780, 13,796-97 ¶¶ 38-40 (2012).

advantage to providers that self-provision telecommunications inputs to their information service offerings.

Under the APA, this kind of fundamental and costly change requires notice-and-comment rulemaking. The Commission, however, promulgated this rule in the course of a single-party adjudication, claiming merely to apply existing law, despite acknowledging the industry-wide practice of submitting entity-wide certifications.⁴ As a result, the Commission expands the USF contribution base, but without reforming the system, acknowledging or justifying the change to its rules, or addressing the competitive harms of the newly evolving rules.

This *ad hoc* approach to USF contributions stymies investment. According to a senior NTCA executive, a recent NTCA study shows that USF uncertainty has caused nearly 70% of NTCA members to put broadband projects—all of which are likely to be in rural areas, where broadband deployment is most needed—“on hold.”⁵

The WebEx proceeding provides the Commission with an opportunity to regain control of its contribution policies and engage in thoughtful, deliberate, and comprehensive USF-contribution reform. By enacting clear, transparent rules applicable to all, such as the connections-based system Sprint and others have proposed,⁶ the FCC can help stabilize the financial foundation of the USF, relieve information-service providers of investment-halting uncertainty, and speed innovation by establishing a level competitive playing field.

⁴ *Id.* at ¶¶ 40-41.

⁵ “Universal Service Reforms Criticized for Lack of Certainty, Accountability,” TR Daily (May 2, 2013), *available at* <http://www.tr.com/online/trd/2013/td050213/index.htm>.

⁶ *Ad Hoc, Google, Skype, Sprint, and Vonage Letter to FCC Commissioners*, WC Docket No. 10-90, *et al.* (filed Aug. 18, 2011) (“*Aug. 18 Coalition Filing*”).

II. USAC Effectively Reclassifies WebEx's Service as Partially Subject to USF Despite Admitting that it Provides an Information Service

WebEx is a quintessential information service: “an online collaboration service that allows users to share information and collaborate on work product through the integration of audio, video, and computing capabilities.”⁷ Thus, the only revenues at issue in this appeal are those generated from WebEx's integrated collaboration service—not from a service that competes with audio-bridge providers, which are subject to USF contributions. No one disputes that a collaboration service that integrates audio, video, and computing features, including voice, is a single service from the consumer's perspective. To its credit, USAC concedes that the core WebEx offering is an information service not subject to USF.⁸

Yet, USAC has treated WebEx's audio *element*, regardless of whether it was part of an audio-only session or a collaboration session, as a telecommunications service offered separately from the information service.⁹ USAC appears to base its classification on three primary factors: WebEx prices its audio minutes separate from its service subscriptions; session participants can forego use of the service's advanced features; and WebEx customers can substitute third-party audio for WebEx's audio.

⁷ *WebEx LLC Request for Review of a Decision of the Universal Service Administrator* at i, WC Docket No. 06-122 (filed Apr. 8, 2013). *See also id.* at 2 (enumerating capabilities). WebEx also offers a legacy audio-only conference-call service, but revenue from that offering is classified as “telecommunications service” and included in its contribution base; the audio-only service thus appears not to be at issue here. *Id.* at 6 n.9.

⁸ *See id.* at Ex. A, p. 12 (concurring that the WebEx “desktop and document sharing service is an information service” and that WebEx does not provide a telecommunications service for the “audio component” when provided “using non-interconnected VoIP from the user's computer”).

⁹ *Id.* at 13.

III. Legal Errors in USAC's Audit Report

USAC's analysis of WebEx's collaboration service returns to the days of *Computer I*, when the Commission announced an *ad hoc*, arbitrary, line-drawing exercise to determine whether an integrated service would be subject to carrier regulation.¹⁰ USAC appears to have decided that it must draw a line through WebEx's service, separating the information-service from the telecommunications components.

But the Commission rejected this approach nearly 35 years ago in *Computer II*, when it divided all services into "basic" and "enhanced" categories.¹¹ In other words, the Commission, rooted in a desire to free advanced services from regulation, rejected *Computer I*'s inescapably arbitrary line-drawing exercise that sought to parse out the telecommunications components embedded within enhanced services.¹²

Instead, the Commission expressly decided to categorize services as "enhanced" even if they included communications components and even if they substituted for traditional telecommunications services, for policy reasons that remain as valid today as when the Commission first adopted them:

We acknowledge, of course, the existence of a communications component. And we recognize that some enhanced services may do some of the same things that regulated communications services did in the past. On the other side, however, is the substantial data processing component in all these services. We never have imposed a scheme of regulation over data processing. Any agency regulatory decision in this area must assess the merits—as we do in this order—of extending regulation to an activity simply because

¹⁰ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Commc'n Servs. and Facilities*, Final Decision and Order, 28 FCC 2d 267, 278-79 ¶ 33 (1971) ("*Computer I*").

¹¹ *Amendment of Section 64.702 of the Comm'n's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384, 428-29 ¶¶ 114-115 (1980) ("*Computer II*").

¹² *Id.* at ¶ 113.

a part of it is subject to the agency's jurisdiction where such regulation would not be necessary to protect or promote some overall statutory purpose.¹³

This remains the law. The FCC, in adopting the foundational *Stevens Report*, held that the 1996 Act adopted and codified the *Computer II* regime—including expressly the rule that an integrated service with both information and telecommunications components is an information service, so long as the end user perceives a single service.¹⁴

The *Cable Modem Order* implemented and followed this principle, holding that, integrated services are information services, regardless of whether users actually use all components of the service.¹⁵ The Commission again expressly rejected the argument that the inherent provision of the telecommunications *component* of an information service amounted to the provision of a telecommunications *service*.¹⁶

In the WebEx audit, USAC disregards all of the above established and determinative law and attempts to subject an integrated information service to USF contribution requirements by relying on end-user choices to parse out the telecommunications element inherent in the information service. But the long line of Commission decisions briefly summarized above demonstrates that it lacks the legal authority to do so.

IV. USAC's Flawed Audit Report Demonstrates That *Ad Hoc* Rulings Are No Substitute for Thoughtful Commission USF Assessment Reform

USAC's rationale for its telecommunications classification here throws into sharp relief the consequences of the Commission's current service-classification approach. One core

¹³ *Id.* at ¶ 132 (emphasis added).

¹⁴ *Fed.-State Joint Bd. on Universal Serv.*, Report to Congress, 13 FCC Rcd. 11,501, 11,529-30 ¶¶ 57-58 (1998) ("*Stevens Report*").

¹⁵ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4822-23 ¶ 38 (2002) ("*Cable Modem Order*").

¹⁶ *Id.* ¶ 39.

problem is that the dividing line between an integrated information service offering (not subject to USF) and a bundled information/telecommunications service offering (subject to USF) is fundamentally indeterminate when analyzed, as USAC does, outside of the context of the regulatory history. As both the Supreme Court and the Commission have recognized, distinguishing telecommunications services from information services can be inherently difficult.¹⁷ As a matter of statutory law, both “telecommunications services” and “information services” involve telecommunications.¹⁸ Even though an “information service” always, by definition, includes a “telecommunications” element, the Commission has nevertheless determined that “telecommunications services” and “information services” are “mutually exclusive categories of service.”¹⁹

In prior orders, the Commission attempts to reconcile these tensions by distinguishing “integrated” services from services that are merely “bundled.” The Commission has said that, when a provider *integrates* “telecommunications” and “information services” into a single offering, the information-service components are “inextricably intertwined with data transport,” and the offering is “appropriately classed as an ‘information service.’”²⁰ The Commission’s classification inquiry asks “whether an entity is providing a ‘single information service with communications and computing components’ or ‘two *distinct* services, one of which is a telecommunications service.’”²¹

¹⁷ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005) (“*Brand X*”); Regulation of Prepaid Calling Card Servs., Declaratory Ruling and Report and Order, 21 FCC Rcd. 7290, 7295-96 ¶¶ 14-15 (2006) (“*Prepaid Calling Card Order*”).

¹⁸ See 47 U.S.C. § 153(50) (defining “telecommunications”), *id* § 153(53) (defining “telecommunications service”), and *id*. § 153(24) (defining “information service”).

¹⁹ *Cable Modem Order* at ¶ 41.

²⁰ *Stevens Report* at ¶ 80.

²¹ *Prepaid Calling Card Order* at 7295 (emphasis added).

This is, of course, the same difficulty the Commission and Congress together wrestled with, *and resolved*, over the long course of *Computer I*, *Computer II*, the 1996 Act, and the *Stevens Report*.

As the WebEx case illustrates, however, the Commission's current standard for making that dispositive ruling – the “inextricably intertwined” standard – becomes no more than a conclusory label when viewed in isolation and applied in disregard of the regulatory history reviewed above. It is not a surprise that USAC, with one eye on the USF funding gap but no real regard for the regulatory history, has chosen to see WebEx's audio feature as a “bundled” service. But unlike beauty, “inextricably intertwined” is not so subjective as to be determined merely by the eye of the beholder. The *Computer* decisions, 1996 Act, *Stevens Report*, *Brand X* and a raft of Commission broadband internet access decisions leave little doubt that WebEx's audio features are “inextricably intertwined” with the rest of its service as a matter of law.

The Commission's USF contribution decisions, however, have been left adrift and never been properly moored to the Commission's information service/telecommunications service decisions. Without a consistent and comprehensible contributions policy reconciled with the Commission's information service decisions, USAC has issued an Audit Report that contradicts the Commission's historic and to-date unaltered approach to service classification. For example:

- USAC appears to base its telecommunications classification, in part, on WebEx's decision to make “audio minutes” a separate pricing element from service subscriptions.
- But pricing has absolutely no bearing on how an end user perceives a service—the primary classification criteria described in the *Stevens Report*. Pricing is simply one element of marketing, and it serves one simple goal: to bring in revenues that exceed costs.
- Providers have myriad choices to achieve this goal in ways that customers will accept, and each provider will make different choices.

- Regardless of how WebEx chooses to price its service, what matters is that Cisco WebEx holds the service out to customers as a single, integrated collaboration service.
- Yet even if pricing *were* relevant, it would undercut rather than support USAC’s position, because the “audio minutes” pricing element of WebEx’s service is well *above* the market for the mere conference-call services. If WebEx’s customers think they are buying a separate, non-integrated telecommunications product, why are they willing to pay a premium?
- USAC also relies on the fact that customers can elect to use only the audio element of the service and ignore the desktop/document-sharing elements.
- But the FCC specifically rejected a what-the-customer-uses test in the *Cable Modem Order*.²²

The result is arbitrary, and the flexibility and expansiveness of USAC’s reasoning sows deep uncertainty. As a practical matter, reasonable people may differ on the degree to which the telecommunications element of an information service is “inextricably intertwined” with the balance of the service. Although WebEx is clearly in the right in light of FCC precedent, the FCC’s failure to articulate clear standards for purposes of assessing USF fosters dueling conclusions and arguments such as USAC’s. When the question arises in the context of USF assessments, the Commission must stop and seek comments, as it has done here, to properly review USAC’s decision.

Without meaningful USF reform, and without legally sound rule modifications, USAC and the Commission are effectively expanding the contribution base without acknowledging the fundamental policy change that results or conducting an appropriate rulemaking proceeding. The result is profound uncertainty across the entire industry, which severely curtails incentives to invest in new technologies. As cited above, large numbers of rural broadband projects are on hold, awaiting regulatory certainty.

²² *Cable Modem Order* at ¶ 38.

The Commission should focus its efforts on adopting common-sense reforms, instead of relying on USAC to implement inconsistent policies, one single-party audit and adjudication at a time. Sprint has urged the ultimate adoption of a technologically neutral assessment on a per-connection basis,²³ but the Commission has other options that it may implement immediately even while larger USF reform efforts continue. For instance, Sprint is part of a diverse industry coalition that has also proposed an interim solution for the classification of MPLS that would eliminate regulatory uncertainty, while increasing aggregate USF contributions.²⁴

Here, the Commission can take one step toward restoring that much-needed regulatory certainty by reversing and remanding USAC's Audit Report. The Commission should make clear that, until it implements reforms through the proper vehicle, the *Cable Modem Order*, the *Stevens Report*, and the preceding framework upon which they rely represent current law.

Respectfully submitted,

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²³ *Aug. 18 Coalition Filing.*

²⁴ *Sprint, BT Global Servs., NTT, Am., Inc., XO Commc'ns, Orange Bus. Servs., and Verizon Letter to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 (filed Mar. 29, 2012).*